

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 12, 2005

STATE OF TENNESSEE v. SENAD TOPORAN

**Direct Appeal from the Criminal Court for Davidson County
No. 2001-C-1792 J. Randall Wyatt, Judge**

No. M2004-00561-CCA-R3-CD - Filed August 24, 2005

The defendant, Senad Toporan, was indicted on two counts for: (1) felony first degree murder during the perpetration of aggravated child abuse; and (2) aggravated child abuse (a Class A felony). The defendant was convicted as charged by a jury and sentenced to life imprisonment for the felony murder conviction and to twenty-five years for the aggravated child abuse, to be served consecutively. The defendant's motion for new trial was filed untimely but was heard and denied. The defendant now appeals, asserting that: (1) the evidence was insufficient to support the convictions beyond a reasonable doubt, and (2) the trial court erred in allowing testimony of domestic assault by the defendant in contravention of Tennessee Rule of Evidence 404.

After careful review, we conclude that the evidence was sufficient to support the defendant's convictions. The defendant, by his untimely filing of the motion for new trial, has waived the issue on evidence admitted in alleged contravention of Tennessee Rule of Evidence 404. We affirm the convictions.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Michael A. Colavecchio, Nashville, Tennessee, for the appellant, Senad Toporan.

Paul G. Summers, Attorney General and Reporter; Kathy D. Aslinger, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Brian Holmgren and Bernard McEvoy, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Factual Background

On September 9, 2001, at 10:37 a.m., Matthew Nixon, a Metro Nashville patrol officer, was driving through an apartment parking lot when he was approached by the defendant holding an infant. The defendant handed the infant to Officer Nixon and said, "Please." The infant victim, later identified as Aldin Toporan, was unconscious, limp, and showed no signs of a pulse or of breathing. The infant was soaking wet, apparently from perspiring, and had a blue tint to his lips and finger nails. Nixon, with the aid of his partner, performed CPR, was able to re-establish breathing, and regained a pulse. After an ambulance removed the victim, Nixon accompanied the defendant to his apartment where they were joined by other officers.

The defendant's wife, Angela Toporan, testified, via an interpreter, that their oldest child, Lana, was born January 28, 2000, and that Aldin, the victim, was born April 11, 2001. The Toporans emigrated from Bosnia to Nashville in September of 2000. The family resided in a one-bedroom apartment at 1000 Thompson Place. Mrs. Toporan worked at Holiday Inn Select, an hour walk from her apartment. Her working hours were from 8:30 a.m. to 4:30 p.m., requiring her to leave for work at 7:00 a.m.

Mrs. Toporan stated that the victim had slept the night of September 8th until early the morning of the 9th. She attempted to feed him before leaving for work, but he rejected the bottle. He was not crying and had gone to sleep when she left for work at 7:00 a.m. on September 9th.

On cross-examination, Mrs. Toporan admitted that she had lied to police in the initial investigation. She stated she had told investigators that Lana had hit the victim with a toy computer and had done so many times. She stated that she lied because she feared the defendant and that he had told her what to tell the police. She testified that the defendant had hurt her many times and threatened to kill her. She said that the defendant had handled the baby roughly and had forced the bottle in the baby's mouth during feedings. Mrs. Toporan denied that Aldin had been injured in an earlier incident at Kroger.

Mrs. Toporan stated that a hole or indentation in their bedroom wall, which was present at 11:40 a.m. on September 9th, had not been there when she left at 7:00 a.m. that morning. She did not know how the hole was made.

Lana was removed from Mrs. Toporan's custody after the victim's death and was not returned until December 13, 2002. During that time Mrs. Toporan dealt with the Department of Children's Services (DCS) to regain custody. Gina Woods testified that she and her husband were foster parents for children under Department of Children's Services' custody. The Woods kept Lana Toporan for over a year as a foster child. Mrs. Woods described Lana as thin but, otherwise, normal. There were periods during Lana's stay when there were infants in the Woods' home. Mrs. Woods said that Lana was loving with the babies and liked to hold and kiss them.

Sherri Goodwin worked in the Child Protective Services Unit of DCS in September of 2001. She, with Officer Shane Finchum, interviewed the Toporans on September 9th through an interpreter, Jadranke Bojic. The defendant stated that, on September 8th, he was at home in a separate room from his children when he heard Aldin cry. Upon checking, the defendant said that Lana had hit the baby on the leg with a toy computer, leaving a bruise, and that the baby had been a little more fussy afterwards.

Angela Toporan stated in the interview that, on September 9th, she had fed Aldin at 5:40 a.m. and that he went back to sleep. Mrs. Toporan then left for work. The defendant said that he arose at 7:50 a.m., fed Aldin, and then went back to sleep. At 9:40 a.m., the defendant checked on Aldin and found that he was not breathing. The defendant grabbed up the baby and ran outside, seeking help.

Officer Shane Finchum, in September of 2001, was assigned to Youth Services Division of Metro Police. During an interview with Aldin Toporan's parents, the defendant told Finchum and Sherri Goodwin that Lana had struck Aldin on the leg with a toy computer on Saturday, September 8th. The defendant was washing his wife's clothing in another room when this occurred, and he did not see Lana hit Aldin. The defendant said that a bruise had appeared on the victim's leg but that Aldin was normal when put to bed that night.

Officer Finchum obtained consent to search the Toporan apartment on September 10th. Finchum had received information from the Identification Division about an indentation, observed on September 9th, in the bedroom wall. He stated that the indentation had been filled and patched by the 10th. The patching appeared fresh and had not been sanded or painted.

Finchum interviewed the defendant again at police headquarters on the night of September 10th. The defendant then stated he had witnessed Lana strike Aldin on the leg with a toy computer on September 8th. The defendant stated that, on September 9th, he was washing his wife's clothing and periodically checking on Aldin. The defendant said that at 9:40 a.m. he noticed Aldin was not looking normal and was not breathing properly. The defendant made no reference to Lana striking the victim on September 9th in this interview.

Detective Brad Corcorran, with Metro Homicide Unit, was dispatched to the Toporan apartment on September 9th. Detective Corcorran brought Mrs. Toporan from her work to the residence. The defendant rushed to her and spoke to his wife in what Corcorran described as a "hyper" and "intimidating" fashion.

Detective Corcorran transported Mrs. Toporan to the hospital, and the defendant followed soon afterwards in a cab. The defendant again pulled his wife aside and spoke to her in their native tongue, which Detective Corcorran could not understand. He did observe that the defendant seemed "very intimidating." Detective Corcorran interviewed the Toporans, through an interpreter, in the emergency room area at Vanderbilt Hospital. Mrs. Toporan professed no knowledge of any prior injuries to Aldin and stated that he was fine when she left home at 7:00 a.m.

The defendant stated that earlier that morning (September 9th), he was doing laundry in the bathroom and heard the victim scream from his crib in the living room. He rushed to the baby and saw Lana standing over him at the crib with the toy computer close by. The defendant added that Lana had hit Aldin the night before with the toy computer and that she was very jealous and aggressive with Aldin. The defendant stated that he grabbed Aldin, ran outdoors to seek help, and eventually encountered the police officer.

Detective Corcorran stated he became aware of the indentation in the drywall of the apartment bedroom that had been patched after September 9th. Pursuant to a search warrant, this section was removed and submitted for testing at the TBI lab. The results showed that no evidence of DNA or blood was found.

On September 12th, Detective Corcorran interviewed the Toporans separately. He said that their respective versions were very consistent and that the wife's version seemed rehearsed. She denied any assaultive-type behavior by the defendant toward her. The defendant was very animated during his interviews.

The toy computer was weighed by Detective Corcorran, and its weight was one and one-half pounds. After Lana had been placed in the Woods' foster home, Detective Corcorran took Aldin's crib there on September 20th to observe Lana's behavior. Lana was unable to climb into the crib and was not successful in reaching in to remove objects from the crib.

Igor Mihic is a Bosnian immigrant who had worked closely with primarily Bosnian immigrants, both as a part of his work and also privately. On September 10th, he was told of a Bosnian infant at Vanderbilt Hospital with serious injuries. Mr. Mihic went to the hospital at 8:00 or 9:00 a.m. and stayed until almost 11:00 p.m., acting as an interpreter. Mr. Mihic stated that the defendant did not seem to understand his son was dying and that the defendant was talking about "ridiculous stuff" such as wanting to buy some cheap cigarettes. Mr. Mihic said the defendant also changed his version of events to the investigating officers. At one point, the defendant stated that the victim was on the floor but later changed his account to say that he was in his baby crib. The defendant wanted to emphasize that he was going to go home and "make another baby to replace Aldin." Mr. Mihic declined to continue interpreting for the questioning after September 10th.

Dr. Gregory Scott Plemmons served as an Assistant Professor of Pediatrics at Vanderbilt Medical Center and served on the care team for reviewing abuse or neglect. Dr. Plemmons was qualified as an expert in Pediatrics. On September 9th, he was notified of possible abuse concerning Aldin Toporan. Dr. Plemmons interviewed the defendant that day using an interpreter in the hospital. The defendant related that his wife had left for work at 7:00 a.m., that he had fed Aldin about 8:00 a.m., and that Aldin had gone back to sleep. Around 10:00 a.m., the defendant noticed the baby was pulseless, not breathing, and pale. The defendant then said he took the child to seek help. The defendant said that Aldin had been healthy in the days leading up to this incident. When asked about bruising on Aldin, the defendant said that Lana was jealous of the baby. The defendant suggested that Lana may have hit Aldin with the toy computer but said he had not witnessed it.

Dr. Plemmons stated that Aldin was in full cardiopulmonary arrest and in critical condition when he arrived at the hospital. An examination revealed that the victim had faint bruising on both buttocks and on the lateral left thigh. Both eyes had bilateral retinal hemorrhages which are “almost always associated with child abuse or Shaken Baby Syndrome.” A C.T. scan showed a large complex fracture of the skull on the right side, with displacement. There was significant swelling of the brain due to a large impact. The doctor later learned that Aldin had an acute tear to the frenulum on the upper lip and an absence of a frenulum on the lower lip. These injuries, he stated, were diagnostic of improper feeding. The right femur, or thigh bone, was fractured. No history was provided that would have explained these injuries. Within twenty-four hours of admission, the medical staff, having determined that the victim was brain dead, terminated life support with parental consent, and the baby expired.

Dr. Plemmons stated the victim met all the medical criteria for Battered Child Syndrome and was the victim of child abuse. He further opined that a child of twenty months of age striking the victim with the toy computer would only leave a small bruise and could not possibly have inflicted the extensive injuries suffered by the victim. Furthermore, the victim had diagnostic symptoms for both Shaken Infant Syndrome and Shaken Impact Syndrome. The fractures suffered by the victim were not more than a week old. He stated that the baby would not be able to feed after suffering the brain injury as it would cause unconsciousness. On cross-examination, Dr. Plemmons stated that a fall from a shopping cart could cause brain injury but would not cause the retinal hemorrhages.

Dr. Bruce Levy, the Chief Medical Examiner for Tennessee and Davidson County, testified as an expert in forensic pathology. He had performed an autopsy on the victim on September 12th. He concluded from his observations that the victim’s cause of death was due to multiple blunt force injuries and that the manner of death was homicide under the circumstances of being a battered child.

Specifically, Dr. Levy found that the victim had bruises and abrasions on the face and scalp areas. The bruises measured from one-eighth inch to several inches and were on the forehead, around the right eye, and on both the right and the back side of the head. A broad area of bleeding was present under the scalp on the right side and including the top and back of the head. Beneath the bleeding was a slightly displaced skull fracture five to six inches in length. There was bleeding inside the skull as well as swelling of the brain, the ultimate terminal event. Hemorrhages were noted in both optic nerves and in the retinas. Hemorrhaging also appeared in the spinal cord of the neck area.

There were ten to twelve areas of bruising on the victim’s body with a variety of colors indicating different ages. The bruising on the right side of the head indicated that the victim was struck by or against a flat broad object. The injury was consistent with striking against a wall. The ages of the bruises indicated the victim was struck on two or more occasions.

The victim suffered two posterior rib fractures which were new, relating to near the time of hospitalization. Dr. Levy opined that these were caused by forceful squeezing of the chest. The nature of the fractured right femur indicated that it was caused by bending the bone backwards and

not by an external blow. He stated that this fracture occurred at least one day prior to the head injuries.

He stated that the victim had every injury associated with Shaken Baby Syndrome. This diagnosis would account for bleeding into the eyes, breaking of the brain wiring, and bleeding into the spinal cord of the neck. Dr. Levy stated that the victim's injuries were "massive" and concluded that he was a battered child. He said that either shaking or the blow to the head could have caused unconsciousness. In Dr. Levy's opinion, the victim's sibling, Lana, could not, at her age, have caused the injuries suffered by the victim.

Sufficiency

The defendant chose not to testify and presented no other evidence. In his first appellate issue, the defendant contends that the evidence was insufficient to support the convictions of felony murder and aggravated child abuse.

The standard for an appellate court reviewing a sufficiency challenge is "whether considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Reid, 91 S.W.3d 247, 276 (Tenn. 2002); see also Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999). Because a verdict of guilt removes the presumption of innocence and imposes a presumption of guilt, the burden shifts to the defendant upon conviction to show why the evidence is insufficient to support the verdict. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). On appeal, the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom. State v. Smith, 24 S.W.3d 274, 279 (Tenn. 2000); see also Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599.

A verdict of guilt by the trier of fact resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). "Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court does not re-weigh or re-evaluate the evidence." Evans, 108 S.W.3d at 236 (citing Bland, 958 S.W.2d at 659). Nor may this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. Evans, 108 S.W.3d at 236-37.

Although the evidence of the defendant's guilt is circumstantial in nature, circumstantial evidence alone may be sufficient to support a conviction. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993). However, in order for this to occur, the circumstantial evidence must be not only consistent with the guilt of the accused but it must also be inconsistent with innocence and must exclude every other reasonable theory or hypothesis except that of guilt. Tharpe, 726 S.W.2d at 900. In addition, "it must establish such a

certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the defendant] is the one who committed the crime.” Id. (quoting Pruitt v. State, 460 S.W.2d 385, 390 (Tenn. Crim. App. 1970)).

A person commits aggravated child abuse who knowingly, other than accidentally, treats a child under eighteen years of age in such a manner as to cause injury, and the abuse results in serious bodily injury to the child. Tenn. Code Ann. § 39-15-401(a), 39-15-402(a). An accused acts “knowingly” with respect to his or her conduct “when [he or she] is aware of the nature of the conduct.” Id. at § 39-11-302. It is a Class A felony if the child is under six years of age. See id. § 39-15-402(b). A person commits first degree felony murder who kills another in the perpetration or attempt to perpetrate several enumerated felonies, including aggravated child abuse. Tenn. Code Ann. § 39-13-202(a)(2).

The medical evidence established that the victim suffered massive injuries which indicated both the result of Shaken Infant Syndrome and Shaken Impact Syndrome. The defendant, in some statements to investigators, suggested that Lana, the victim’s twenty-month-old sibling sister, inflicted the injuries. The medical witnesses rejected this theory as impossible. On appeal, the defendant argues that the evidence failed to establish that he was the person who inflicted the injuries to the infant victim. However, the defendant’s wife testified that the victim was fine when she left at 7:00 a.m. on September 9th. The defendant claimed that he fed the victim at 7:50 a.m. and that the baby was normal. The jury was left with the inescapable conclusion that in the intervening time until the defendant encountered Officer Nixon at 10:37 a.m., only he and his daughter, Lana, had access to the victim. The medical evidence established that the victim was struck by or against a broad flat object, severely enough to cause a displaced skull fracture and associated brain swelling. The defendant’s wife testified to an indentation on the bedroom wall that had not been present when she left for work on September 9th. This area was crudely patched by the next day. The fact that no traces of DNA or blood could be found in the wall sample after this patching is not dispositive toward exculpation.

The defendant argues that the murder did not occur within the “res gestae” or in “perpetration” of the felony of aggravated child abuse. We disagree. First degree felony murder requires only that intent to commit the supporting offense, herein, aggravated child abuse. See Tenn. Code Ann. § 39-13-202(b). The killing and the felony must be “closely connected in time, place, causation, and continuity of action.” State v. Pierce, 23 S.W.3d 289, 294 (Tenn. 2000).

The jury in this case could rationally conclude that the defendant was guilty of aggravated child abuse and that the victim died as a direct result of that abuse. There is an abundance of evidence to support the jury’s verdict of convictions on both offenses.

The defendant further argues that the evidence was silent as to any evidence of planning by the defendant or of premeditation. We do not necessarily agree with the defendant’s conclusion but merely note that in a felony murder prosecution, there is no burden of proving premeditation. State v. Hopper, 695 S.W.2d 530, 535 (Tenn. Crim. App. 1985).

In his second issue, the defendant contends that the trial court erred in allowing testimony concerning prior domestic abuse by the defendant in contravention of Tennessee Rule of Evidence 404(b). However, the defendant's motion for new trial was not filed until January 20, 2004, eight days after the due date. The order of sentence was entered on December 11, 2003. A motion for new trial "shall be made . . . within thirty days of the date the order of sentence is entered." Tenn. R. Crim. P. 33(b). The time for filing a motion for new trial is mandatory and may not be extended. Tenn. R. Crim. P. 45(b); State v. Johnson, 980 S.W.2d 414, 418 (Tenn. Crim. App. 1998). The thirty-day provision is jurisdictional, and an untimely motion is a nullity. State v. Johnson, 980 S.W.2d at 418. The defendant has waived his right to appeal any of the issues contained in the motion for new trial other than sufficiency of the evidence and sentencing. See State v. Patterson, 966 S.W.2d 435, 440 (Tenn. Crim. App. 1997). This court, in its discretion, may take notice of plain error which affects a substantial right of the defendant where necessary to do substantial justice. Tenn. R. Crim. P. 52(b); State v. Johnson, 980 S.W.2d at 418.

The testimony, which the defendant objected to, was testimony by the defendant's wife of her prior beatings at the defendant's hands resulting on one occasion with the defendant serving seven days in jail. After a jury out hearing, the trial court initially excluded this testimony with the caveat that cross-examination could affect the ruling. After the wife was vigorously challenged on cross-examination regarding her credibility and why she had originally lied to the police, she was allowed to explain on re-direct the reasons why she feared the defendant.

We do not view this testimony as plain error. In order to determine that plain error exists: (A) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice."

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (citing State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). All five factors must be established before plain error will be recognized. Id. at 282-83. Consideration of all of the factors is unnecessary when the record demonstrates that at least one of the factors cannot be established. Id. at 283. Furthermore, the "plain error" must [have been] of such a great magnitude that it probably changed the outcome of the trial." Id. (quoting Adkisson, 899 S.W.2d at 642).

In our view, there has been no breach of a clear and unequivocal rule of law. The evidence of domestic abuse was only allowed after cross-examination questioned the defendant's wife's credibility. The testimony was then allowed on re-direct to explain her prior untruthfulness and not for the purpose of showing action in conformity with a character trait. The defendant has waived this issue through an untimely filing of the motion for new trial, and plain error is not present.

Conclusion

Our review of the defendant's appeal and the record as a whole reveals no reversible error. Accordingly, the judgments of the trial court are affirmed.

JOHN EVERETT WILLIAMS, JUDGE